Texas Automobile Dealers Association

1108 Lavaca, Suite 800 Austin, Texas 78701-2181 (512) 476-2686 Fax: (512) 322-0561 www.tada.org

August 8, 2012

Texas Department of Motor Vehicles General Counsel's Office 4000 Jackson Avenue Austin, Texas 78731

Attn: Lea Burnett

Sent via email to: <u>DMV_FormalOpinions@TxDMV.gov</u> <u>Lea.Burnett@txdmv.gov</u>

Re: Broker's Prohibition Formal Opinion

Dear Ms. Burnett:

In response to the request for a formal opinion filed by Smith & Associates on June 13, 2012, please accept the following comments filed on behalf of the Texas Automobile Dealers Association (TADA), the Texas Recreational Vehicle Association (TRVA), and the Texas Motorcycle Dealers Association (TMDA).

Services at Issue

The formal opinion request defines the services at issue as follows:

Our client provides a range of services within the car buying and selling industry. He holds an independent dealer license (General Distinguishing Number) from the Texas Department of Motor Vehicles as a used car dealer, but is not licensed as a new car dealer. This request for a formal opinion is limited to our client's desired services regarding the assessment, choice and negotiation for the purchase of new automobiles on behalf of the clients, as set forth below.¹

¹Request for Formal Opinion p. 2.



Smith & Associates states that their client is providing a consulting service that assists in finding a person's ideal vehicle purchase including negotiating for the purchase price on behalf of the potential vehicle buyer. Compensation is paid to Smith & Associates' client by the vehicle purchaser.

The role of the requestor's client is to locate available vehicles for purchase; assist with test driving; negotiate the purchase price with the franchised dealerships; and suggest private financing options.

The question presented by these facts is whether or not these activities would amount to "brokering" under applicable law and thus be prohibited.

Legislative Background

In 1979, the 66th Legislature enacted a broker definition and broker prohibition. The definition stated:

"Broker" means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale, for purposes other than resale, of a new motor vehicle, and who is not:

- (A) a dealer or a bona fide agent or employee of a dealer;
- (B) a representative or a bona fide agent or employee of a representative;
- (C) a distributor or bona fide agent or employee of a distributor; or,
- (D) at any point in the transaction the bona fide owner of the vehicle involved in the transaction.²

That same bill in 1979 included a prohibition on brokering: "A person may not act as, offer to act as, or hold himself or herself out to be a broker."

The broker definition was amended in 1995 with the inclusion of "franchised" dealer:

"Broker" means a person who, for a fee, commission or other valuable consideration, arranges or offers to arrange a transaction involving the sale, for purposes other resale, of a new motor vehicle, and who is not:

(A) a franchised dealer or bona fide employee of a franchised

²Chapter 709, Acts of the 66th Legislature, Regular Session, 1979, effective September 1, 1979; TEX. REV. CIV. STAT. ANN. art. 4413(36) § 1.03(10) (Vernon Supp. 1979).

³Chapter 709, Acts of the 66th Legislature, Regular Session, 1979, effective September 1, 1979; TEX. REV. CIV. STAT. ANN. art. 4413(36) § 5.03 (Vernon Supp. 1979).

dealer when acting on behalf of a franchised dealer;4

. . .

The 76th Legislature amended the definition of "broker" by repealing "for purposes other than resale" from the definition:

"Broker" means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale [,for purposes other than resale,] of a new motor vehicle, and who is not:

- (A) a franchised dealer or bona fide employee of a franchised dealer when acting on behalf of a franchised dealer;
- (B) a representative or bona fide employee of a representative when acting on behalf of a representative;
- (C) a distributor or bona fide employee of a distributor when acting on behalf of a distributor;
- (D) at any point in the transaction the bona fide owner of the vehicle involved in the transaction.⁵

The codification in 2001, effective June 1, 2003, transferred the current definition of "broker" to the Occupations Code at § 2301.001(3), as well as the broker prohibition to Occupations Code § 2301.006.6

⁴Chapter 357, Acts of the 74th Legislature, Regular Session, 1995, effective June 8, 1995; TEX. REV. CIV. STAT. ANN. art. 4413(36) § 1.03(9) (Vernon Supp. 1995).

The bill, as filed, included a modification of "broker" definition so that it read: "Broker means a person who, for a fee, commission, or other valuable consideration, solicits or refers prospective buyers or arranges or offers to arrange a transaction involving the sale, for purposes other than resale, of a new motor vehicle, . . ."

According to April 20, 1995, Senate Journal, Senator Cain submitted the following statement of legislative intent on C.S.S.B 1139: "In order to clarify certain provisions of C.S.S.B. 1139, including changes from the bill as originally introduced, I would note the following: 1. The substitute contains the current definition of 'broker' as it appears in Section 1.03 of the Code. The original bill would have codified the agency's current interpretation of the meaning of 'broker' by adding the words 'solicits or refers . . .' Although the additional language would have made clear the agency's construction of the statute, it is not a required change at this time, and so I have opted to maintain the definition in its current form. . ."

⁵Chapter 1047, Acts of the 76th Legislature, Regular Session 1999, effective June 18, 1999; TEX. REV. CIV. STAT. ANN. art. 4413(36) § 1.03(3) (Vernon Supp. 1999).

⁶Chapter 1421, Acts of the 77th Legislature, Regular Session 2001, effective June 1, 2003; TEX. OCC. CODE ANN. ch. 2301 (Vernon Supp. 2001).

Occupations Code § 2301.001(3):

"Broker" means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale of a new motor vehicle, other than a person who is:

- (A) a franchised dealer or a bona fide employee of a franchised dealer acting for the franchised dealer;
- (B) a representative or a bona fide employee of a representative acting for the representative;
- (C) a distributor or a bona fide employee of a distributor acting for the distributor; or
- (D) the owner of the vehicle at any point in the transaction.

Occupations Code § 2301.006. Brokers Prohibited

"A person may not act as, offer to act as, or claim to be a broker."

Attorney General Opinion No. MW-356 (July 14, 1981)

Subsequent to the legislature amending the statute to prohibit a person from acting as a broker after September 1, 1979, Mr. Russell Harding, Executive Director for the Texas Motor Vehicle Commission (the predecessor of the current Texas Department of Motor Vehicles) requested an opinion regarding the constitutionality of the prohibition.

The Attorney General's opinion is based on the understanding that a new vehicle broker acts as a purchasing agent for a consumer and in the usual brokered transaction, the broker obtains the customer's vehicle specifications; takes a deposit; and contacts a franchised dealer for the customer's vehicle specifications who has previously agreed to sell vehicles through the broker at a discount. When the vehicle is available, the broker's client purchases the vehicle from the franchised dealer.

The opinion reviewed the state's police power; the challenge that could be made under the Fourteenth Amendment on substantive due process grounds; the purpose of the TMVC Code; property rights; and determined that the State of Texas has a legitimate interest in protecting an automobile consumer and the statute meets the rational protection test and is therefore constitutional (see attached Enclosure).

Although the fact situation set out in MW-356 is not identical to that presented here, the opinion is nevertheless instructive in the current scenario in that it clearly establishes the fact that the regulation of brokering is a legitimate interest of the state.

Since MW-356, the definition of "broker" was again amended in 1999, so that "for purposes other than resale" was no longer a part of the definition; thus, disallowing a "broker" from purchasing and titling a new motor vehicle.

Another change to the statute since MW-356 involves precluding the sale of a new motor vehicle by anyone other than a franchised and licensed dealer for that franchise. This amendment was enacted by the legislature in 1981 through § 5.04 of Article 4413 (36), which provided that:

No person may represent to the public, by advertising or other means, that he is engaged in the business of buying, selling, or exchanging new motor vehicles unless he holds a valid license issued by the Commission for the make or makes of new motor vehicles being bought, sold, or exchanged; or unless such person is acting as a bona fide employee or agent of the licensee; or unless such person is a second-stage or allied equipment manufacturer modifying or converting new motor vehicles and offering them for sale with the original manufacturer's warranty unimpaired.⁷

The broker prohibition, now codified in Occupations Code § 2301.252 states:

- (a) A person may not engage in the business of buying, selling, or exchanging new motor vehicles unless the person:
 - (1) holds a franchised dealer's license issued under this chapter for the make of new motor vehicles being bought, sold, or exchanged; or
 - (2) is a bona fide employee of the holder of a franchised dealer's license.

• •

Although MW-356 is useful for the constitutionality and understanding of the definition and prohibition of brokering, the statutory amendments since its writing are beneficial for an understanding of the evolution of the state's desire to have an orderly system of distribution and sale of motor vehicles through the licensing and the franchise of new motor vehicle dealers as the buying, selling, or exchanging of motor vehicles vitally affects the general economy of the state and the

⁷Chapter 235, Acts of the 67th Legislature, Regular Session, 1981, effective May 28, 1981; TEX. REV. CIV. STAT. ANN. art. 4413(36) § 5.04 (Vernon Supp. 1981).

This statute was challenged in <u>G.J. Deasy Investment, Inc. v. James A. Mattox, Attorney General for the State of Texas, et al.</u>, 778 F.2d 1091 (1985). The court stated that "in 1983, in response to efforts of the Texas Association of Automobile Dealers (*sic*), the Texas legislature amended the statute making a franchise from the manufacturer of a particular vehicle a prerequisite to entitlement to a license to sell such vehicle." The court, relying upon <u>Rice v. Norman Williams Co.</u>, 458 U.S. 654, 102 S.Ct. 3294 (1982), affirmed the district court's grant of summary judgment for the Attorney General of Texas.

public interest and welfare of its citizens.8

Broker Prohibition and Formal Opinion Request

Brokering can take on many forms. A broker is generally a "middleman" or an agent with limited authority.

In the motor vehicle arena, Texas law defines a broker as someone who receives compensation or other valuable consideration for arranging or offering to arrange the sale of a new motor vehicle. A broker is not a franchised dealer or an employee of a franchised dealer; a representative or an employee of a representative; ⁹ a distributor or employee of a distributor; ¹⁰ or the owner of the vehicle.

To arrange or offer to arrange a vehicle transaction includes the act of negotiation. Webster's dictionary defines "negotiate" as conferring with another so as to arrive at the settlement of some matter. 11

Black's Law Dictionary defines "negotiate" as transacting business, to treat with another respecting a purchase and sale, to hold intercourse to bargain or trade, to conduct communications or conferences. It is that which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of a contract.¹²

The act of negotiating is included in the arranging or offering to arrange a transaction

⁸Id. at TEX. OCC. CODE ANN. § 2301.001. Construction; Purpose (Vernon 2012).

⁹A "representative" means a person who:

⁽A) is or acts as an agent or employee for a manufacturer, distributor, or converter; and

⁽B) performs any duty in this state relating to promoting the distribution or sale of new motor vehicles or contacts dealers in this state on behalf of a manufacturer, distributor, or converter. (Id. at Tex. Occ. Code Ann. § 2301.002(29) (Vernon 2012)).

¹⁰A "distributor" means a person, other than a manufacturer, who:

⁽A) distributes or sells new motor vehicles to a franchised dealer; or

⁽B) enters into franchise agreements with franchised dealers, on behalf of the manufacturer. (Id. at § 2301.002(11)).

¹¹WEBSTER'S NEW COLLEGIATE DICTIONARY (7th ed. 1969).

¹² BLACK'S LAW DICTIONARY (4th ed. 1968).

involving the sale of a new motor vehicle as negotiating requires discussion of the purchase; thus, either arranging the purchase or offering to arrange a purchase implies as well as requires negotiating with the seller of the vehicle.

The act of negotiating, standing alone, does not satisfy the "broker" prohibition; however, when a person who is arranging or offering to arrange a motor vehicle sale receives a fee, a commission, or other valuable consideration, then that person is a broker unless the person is a franchised dealer (or employee); a representative (or employee); a distributor (or employee); or the owner of the vehicle in the transaction.

In the service at issue, "the clients compensate our client solely with an hourly fee for the consultation services, which is not tied with a commission or other contingency basis and does not vary if no vehicle is selected." Payment, whether by the hour, by the job, on a percentage, or with anything of value, is consideration and included within the definition of a broker.

The applicability of the prohibition is not dependent on the identity or role of the party making the payment or paying the fee. The definition states that a broker is a person who for a fee, commission, or other valuable consideration, arranges or offers to arrange a new motor vehicle sale. If monies or other consideration is paid to a person for arranging or offering to arrange a new motor vehicle sale, regardless of who is making the payment, the broker definition is satisfied.

If the legislature had intended the broker payment prohibition to be limited from a broker to a dealer, the statute would have so stated.

It is therefore our position that the service at issue is within the brokering definition and therefore prohibited.

If you have any question or if I may provide any additional information, please do not hesitate to contact me.

Respectfully submitted,

Karen Phillips

General Counsel/EVP

Enclosure

¹³Request for Formal Opinion p. 3.

c: Ms. Rebecca J. Sobie Smith & Associates Attorneys 900 Ranch Road 620 South Suite C101-159 Austin, Texas 78734

> Mr. Mike Marks Texas Motorcycle Dealers Association 823 Congress, Suite 230 Austin, Texas 78701

Mr. Clark McEwen Texas Recreational Vehicle Association 1016 La Posada, Suite 210 Austin, Texas 78752

ENCLOSURE

ATTORNEY GENERAL OPINION NO. MW-357 July 14, 1981



RO.260

The Attorney General of Texas C E

July 14, 1981

JUL 1 6 1981

MARK WHITE Attorney General

Supreme Court Building P.O. Box 12548 Austin, TX. 78711 512/475-2501

701 Commerce, Suite 200 Dallas, TX. 75202 214/742-8944

4824 Alberta Ave., Suite 160 El Paso, TX. 79905 915/533-3484

1220 Dallas Ave., Suite 202 Houston, TX. 77002 713/650-0666

806 Broadway, Suite 312 Lubbock, TX, 7940 t 806/747-5238

4309 N. Tenth, Suite B McAllen, TX. 78501 512/682-4547

200 Main Plaza, Suite 400 San Antonio, TX. 78205 512/225-4191

An Equal Opportunity/ Affirmative Action Employer Honorable Russell Harding Executive Director Texas Motor Vehicle Commission P. O. Box 2293 Austin, Texas 78768 TEXAS MOTOR VEHICLE COMMISSION

Opinion No. MW-356

Re: Constitutionality of article 4413(36), section 5.03, V.T.C.S., prohibiting automobile brokers

Dear Mr. Harding:

You request our opinion advising you whether section 5.03 of the Texas Motor Vehicle Commission Code is a valid exercise of the police power of the State of Texas, or whether such a prohibition violates the Texas Constitution or the Constitution of the United States.

The Texas Motor Vehicle Commission Code, V.T.C.S. article 4413(36), section 1.03(10) defines a "Broker" as follows:

'Broker' means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale, for purposes other than resale, of a new motor vehicle, and who is not:

- (A) a dealer or a bona fide agent or employee of a dealer;
- (B) a representative or a bona fide agent or employee of a representative;
- (C) a distributor or bona fide agent or employee of a distributor; or
- (D) at any point in the transaction the bona fide owner of the vehicle involved in the transaction.

Section 5.03 of the code prohibits people from acting as brokers in Texas after September 1, 1979. Since any contracts entered into prior to September 1, 1979 would now almost certainly be filled, we need not address any effect the statute might have on contracts executed before the effective date of the statute.

We are given to understand that a new car broker acts as a purchasing agent for consumers. We are told that in the usual brokered transaction, the

broker first obtains the exact specifications of the car the customer wishes to buy, takes a deposit, and then contacts - either directly or through a brokerage service - a franchised dealer of the type automobile desired who has previously agreed to sell his car through the broker at a discount. When the ordered vehicle arrives at the dealer's place of business from the manufacturer or distributor, the broker is notified, and the broker's client then picks up the car at the dealership, purchasing it directly from the franchised dealer at the discounted price. From that point, the transaction is like any other new car purchase, with the same manufacturer's warranty and service obligations obtaining that apply to non-brokered transactions. The consumer purchases at a discount; the broker gets a commission; and the dealer makes a reduced profit. At no time does the broker own, or take title to, the automobile made the subject of the transaction.

It appears that before the new law, brokers, their firms, and dealers had to cooperate to sell a consumer a new car, but until the time of delivery to the dealership, the consumer only dealt with the broker or his firm. This necessarily limited the consumer's recourse in the case of dissatisfaction. Presumably the brokers and dealers cooperated because it was economically advantageous for both of them. If dealers ever wanted to do away with the competition of brokers they could refuse to deal with them. None of this is changed by the new law. If it is economically advantageous to deal with brokers, dealers can hire the brokers as employees for the same type of transactions as transpired in the past. Only now dealers will be involved as employers from the beginning of the transaction, and consumers will have the added protection of dealing with the employee of a dealer. If it is not economically advantageous to deal with brokers, they will not be hired; just as in the past they would not have been used. Brokers cannot exist without the "hiring" by someone in the distributor - representative - dealer chain. Whether this hiring be for a term, payable per transaction, or simply per transaction, the only effect of the new law is to aid and protect the consumer by involving the dealer, and consequently his statutory and financial obligations, throughout the transaction.

Generally, the police power is regarded as a grant of authority from the people to their government agents for the protection of the health, safety, comfort and welfare of the public. Obviously this power must include the authority to regulate the conduct of any business that affects the welfare of the public. See generally Ferguson v. Skrupa, 372 U.S. 762 (1963). The sale of new cars affects the welfare of the public, and the regulation of these sales is a valid exercise of the police power if it does not deprive people of due process or equal protection under the federal or state constitutions. Since the new law does not change the ability of people to act as brokers, in concert with those who manufacture and distribute cars, it should not deprive anyone of due process or equal protection.

A presumption of constitutionality attaches to every state enactment. Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532 (1935).

The party claiming legislation to be invalid as constituting a deprivation of property without due process carries a heavy

burden. He must establish such invalidity 'clearly or beyond a reasonable doubt, and must overcome, by facts judicially known or proved, not only the evidence sustaining constitutionality, but any state of facts which can be reasonably conceived to sustain it.' (Emphasis added) 16 C.J.S. Constitutional Law \$99, at p. 407.

State ex rel. Pan Am. Production Co. v. Texas City, 295 S.W.2d 697 (Tex. Civ. App. -Galveston 1956), aff'd, 303 S.W.2d 780 (Tex. 1957), appeal dismissed, 355 U.S. 603 (1958). Where an economic regulation is challenged under the Fourteenth Amendment on substantive due process grounds, the regulation will not be overturned as long as "there is an evil at hand for correction, and... it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). Even if no complaints had been filed against the brokers, the legislation would not necessarily be invalid. The state may legitimately legislate against problems which have yet to manifest themselves as long as the problem is at least rationally conceivable. Olsen v. Nebraska, 313 U.S. 236, 246-47 (1941). If the economic regulation is challenged on equal protection grounds, i.e., unaffiliated brokers may not sell new cars but affiliated brokers may, it still enjoys a presumption of constitutionality. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Besides, all brokers must be affiliated with a manufacturer, representative or dealer to obtain new cars.

The purpose of the Texas Motor Vehicle Commission Code is to "insure a sound system of distributing and selling new [cars]... and to prevent frauds, unfair practices, discriminations, impositions, and other abuses of our citizens." V.T.C.S. art. 4413(36), \$1.02. This is a valid purpose for invoking the police power. Detroit Automotive Purchasing Services, Inc. v. Lee, 463 F. Supp. 954, 968 (D. Md. 1978). If the prohibition of unaffiliated new car brokers rationally relates to this purpose, the legislation will withstand constitutional attacks based on due process rights and equal protection rights. It seems unquestionable that requiring new cars to be sold by licensed dealers or their agents or employees relates to the protection of the car buying public. If it is "rationally conceivable" that this legislation will protect automobile consumers, then it is within the police power to so legislate. Olsen v. Nebraska, supra, at 246-247. The judiciary will not sit as a super legislature to judge the wisdom or desirability of this legislative policy determination. City of New Orleans v. Dukes, supra, at 303.

The Texas Constitution also classifies the right to earn a living as a property right of which one cannot be deprived without due process of law. Smith v. Decker, 312 S.W.2d 632 (Tex. 1958); See Falfurrias Creamery Company v. City of Laredo, 276 S.W. 2d 351 (Tex. Civ. App. - San Antonio 1955, writ ref'd n.r.e.). If the new code, purporting to "insure a sound system of distributing and selling new [cars]... and to prevent frauds, unfair practices, discriminations, impositions, and other abuses of our citizens," bears no substantial relationship to these objects, the statute violates the

due process clause of the Texas Constitution, article I, section 19. Texas State Board of Pharmacy v. Gibson's Discount Center, Inc., 541 S.W.2d 884, 887 (Tex. Civ. App. - Austin 1976, writ ref'd n.r.e.). Texas courts have been willing to consider the wisdom of legislation; however, in this situation, it appears as though the formalizing of the contractual relationship between dealers and brokers will bear a substantial relationship to the prevention of fraud and abuses of Texas citizens.

Article I, section 3 of the Texas Constitution also guarantees equality of rights to all persons, but the mere fact that the new motor vehicle code might appear to descriminate against certain people who want to sell new cars does not render it unconstitutional. San Antonio Retail Grocers v. Lafferty, 297 S.W.2d 813 (Tex. 1957). Generally, the legislature is empowered to make classifications and exemptions which are not arbitrary and unreasonable. Watts v. Mann, 187 S.W.2d 917 (Tex. Civ. App. - Austin 1945, writ ref'd). In determining whether a classification is arbitrary and unreasonable, the Texas Supreme Court has held that the test is "whether there is any basis for the classification which could have seemed reasonable" to the legislature in making such a distinction. Lafferty, supra, at 815. As the broker is not precluded from engaging in his occupation, it does not seem unreasonable to protect the consumer by tying the broker to the dealer contractually.

You have also requested our opinion advising you whether a new car becomes "used" if a person purchases a new car ordered by a broker, registers and titles the vehicle in its own name in the State of Missouri, and then drives the car to Texas for delivery and transfer of title to the broker. The broker would then deliver the automobile and title to the buyer.

The Texas Motor Vehicle Commission Code defines a new motor vehicle as one "which has not been the subject of a 'retail sale' as defined in Article 6.03(B), Title 122A, Taxation-General, Revised Civil Statutes of Texas, 1925, as amended." V.T.C.S. art. 4413(36), \$1.03(2). Article 6.03(B) defines a retail sale as including "all sales of motor vehicles except those whereby the purchaser acquires a motor vehicle for the exclusive purpose of resale and not for use." It does not appear that either of the first two "sales" contemplated in the above method of operation would constitute a retail sale; therefore, for purposes of the Texas Motor Vehicle Commission, the motor vehicle would still be a new motor vehicle when transferred to the buyer.

There is, of course, an exception for persons who are bona fide owners of the vehicles involved in the transaction. V.T.C.S. art. 4413(36), \$1.03(10D). While there may be instances where a person who otherwise would be a broker except for the fact that he falls under this exception, we believe that when the broker acts as the agent of the ultimate purchaser, the broker cannot be classified as a bona fide owner within the meaning of section 1.03(10).

SUMMARY

The State of Texas has a legitimate interest in protecting automobile consumers and in regulating the sale of new motor

vehicles. The Texas Motor Vehicle Commission Code rationally implements this protection and regulation without invidious discrimination, and is therefore constitutionally permissible. The sale of a new motor vehicle for the exclusive purpose of resale does not change the classification of the vehicle from a new motor vehicle for the purposes of the Texas Motor Vehicle Commission Code. One who is not an agent for the ultimate purchaser, but a bona fide owner of a new car, will not be classified as a broker under the Texas Motor Vehicle Commission Code.

Very truly yours,

MARK WHITE Attorney General of Texas

JOHN W. FAINTER, JR. First Assistant Attorney General

RICHARD E. GRAY III Executive Assistant Attorney General

Prepared by Peter Nolan Assistant Attorney General

APPROVED: OPINION COMMITTEE

Susan Garrison, Acting Chairman Jon Bible Peter Nolan